cBefore the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Petition for Declaratory Ruling to the	)	WC Docket No. 09-152
Iowa Utilities Board and Contingent	)	
Petition for Preemption	)	

OPPOSITION OF QWEST COMMUNICATIONS COMPANY, LLC.
TO EMERGENCY MOTION FOR STAY

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SUMMARY

In this Emergency Motion for Stay, Great Lakes Communications Corp. and Superior Telephone Cooperative (Great Lakes) request that the Commission "stay" the Final Order of the Iowa Utilities Board in the traffic pumping investigation before the Board. The basis of the requested "stay" is that there is a pending Preemption Petition before the Commission (also filed by Great Lakes) and Great Lakes is confident that the Preemption Petition will ultimately be granted. Hence, Great Lakes requests that the Commission essentially preempt the Iowa Board before it actually makes a determination of whether preemption is actually appropriate.

In this Opposition, Qwest makes three points.

First, the Commission does not have the jurisdiction to "stay" an order of the Iowa Utilities Board. If the Board were found to be operating in excess of its jurisdiction, and this operation were to interfere with Commission regulation of interstate telecommunications, the Commission could obtain an injunctive order from a court under Section 401(b) of the Act, but has no authority to actually stay the Board's Order.

Second, a review of the Order of the Iowa Board demonstrates that it operated well within the bounds of its authority over intrastate telecommunications services. Great Lakes contends that preemption is warranted whenever there is an impact on interstate telecommunications caused by a state regulation dealing with intrastate telecommunications (the word used by Great Lakes is "impingement"). This is simply not the law. Worse yet, Great Lakes tries to buttress this argument by mischaracterizing what the Iowa Board actually did. A review of the Order itself demonstrates that the Iowa Board was quite scrupulous in ensuring that it paid due respect to the limits of its own jurisdiction and the plenary authority of the Commission in regulating interstate telecommunications services.

Third, the requested stay would be inconsistent with the public interest. The system of dual regulation of telecommunications services in the United States requires that the respective jurisdictions show respect for each others' policies and decisions. Great Lakes requests that the Commission simply trample over the Iowa Utilities Board's regulation of intrastate telecommunications services without even a final finding that any of Great Lakes' assertions are true. Such rash and heedless disregard of state jurisdiction over intrastate telecommunications services would be the very antithesis of action in the public interest.

The Motion should be either dismissed for lack of jurisdiction or denied.

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**OPPOSITION OF QWEST COMMUNICATIONS COMPANY, LLC.
TO EMERGENCY MOTION FOR STAY**

Qwest Communications Company, LLC (Qwest) hereby files this Opposition to an Emergency Motion for Stay of Iowa Utilities Board Final Order Pending Review, filed by Great Lakes Communications Corp and Superior Telephone Cooperative (Great Lakes), on Oct. 1, 2009 in the above-captioned proceeding.[1] Great Lakes asks that the Commission stay the Final Order of the Iowa Utilities Board in Docket No. FCU-07-02, issued September 21, 2009 until after the Commission has ruled on Great Lakes' Petition for Declaratory Ruling and Contingent Petition for Preemption, filed August 14, 2009.

Great Lakes contends that the Iowa Board's Order unlawfully intrudes into federal jurisdiction, and that the Commission should stay the effectiveness of that Order until after it has had a chance to rule on the merits of this core issue. Great Lakes' fundamental position is that the Iowa Board is without authority to deal with intrastate traffic pumping, indeed, that the Board is without authority to determine whether Free Service Providers (FSPs) are customers under the Respondents' local exchange tariffs, whether the intrastate traffic funneled to the FSPs was subject to their intrastate access tariffs, and whether the Respondents had violated the terms of

[1] On October 6, 2009, Aventure Communication Technology, LLC filed an "Emergency Petition for Stay." This Petition is simply repetitious of the Great Lakes filing and does not merit a separate response. Qwest opposes it on the same grounds as stated here.

their state carrier certifications. Without awaiting an actual decision on the pending Preemption Petition filed by Great Lakes, the Motion requests that the Commission affirmatively "stay" the Order of the Iowa Utilities Board pending action on that Petition.

I. THE COMMISSION IS WITHOUT AUTHORITY TO "STAY" ENFORCEMENT OF A DULY ENACTED ORDER OF THE IOWA UTILITIES BOARD.

Great Lakes' Stay Motion is based on the assumption that the Commission has the authority to "stay" an order of a state public utility commission. The Commission has no such authority. The Commission can, in proper circumstances, preempt state action, but in such cases it must enforce its preemption in court by bringing an action under Section 401(b) of the Act.[2] The notion that the Commission possesses direct authority to control the actions of a state regulatory agency through issuance of an injunction or a stay order is simply erroneous, and the Commission has never sought to proclaim such authority.[3]

Great Lakes cites the *Charter Communications* case in support of the Commission's alleged injunctive authority over state regulatory agencies.[4] *Charter Communications* involved Commission enforcement of its statutory authority over basic cable rates, and its statutory obligation to enact rules to resolve disputes between local franchising authorities and cable

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[2] 47 U.S.C. § 401(b). *See Hawaiian Tel. CO. v. Public Utilities Commission*, 827 F.2d 1264 (9th Cir. 1987); *South Central. Bell Tel. Co. v. Louisiana Pub. Service Commission*, 744 F.2d 1107 (5th Cir. 1984); *New England Tel and Tel. Co. v. Public Utilities Commission*, 742 F.2d 1 (1st Cir. 1984); *Southwestern Bell Tel. Co. v. Arkansas Public Service Commission*, 738 F.2d 901 (D.C. Cir. 1984).

[3] In the case of private parties, the Commission can also enforce its orders by levying forfeitures against non-compliant parties. *See, e.g.,* 47 U.S.C. § 503(b). Obviously the Commission has no forfeiture authority over a state regulatory agency acting in the performance of its official duties under state laws separate and apart from any role of the statue regulatory agency as a Commission-regulated entity, *e.g.,* as a radio licensee.

[4] *In the Matter of Charter Communications Entertainment I, LLC, Petition for Determination of Effective Competition in St. Louis, Missouri*, Memorandum Opinion and Order, 22 FCC Rcd 13890 (2007).

operators regarding implementation of the statutory rate regulation scheme.[5] It did not involve federal preemption of state regulatory authority over intrastate telecommunications, but exercise of direct statutory Commission jurisdiction over local franchising authorities' regulation of basic cable rates. *Charter Communications* does not stand for the proposition that the Commission has general jurisdiction to issue injunctive orders binding on a state regulatory agency operating within its sphere of authority -- any preemption order that it issued would need to be enforced by court order. In fact, even if all of the allegations made by Great Lakes were true and the Commission declared the Iowa Board Order preempted, the Commission would still not have the authority to enjoin the Iowa Board from enforcing its order.

In other words, the Motion asks that the Commission perform an action that is beyond the reach of its own jurisdictional authority. The Commission cannot "stay" the Order of the Iowa Board. The Motion should be dismissed.

II. GREAT LAKES' ARGUMENTS ON FEDERAL PREEMPTION ARE DEEPLY ERRONEOUS -- AND PREEMPTION WOULD NOT BE WARRANTED EVEN IF GREAT LAKES HAD BROUGHT A PROPER PREEMPTION PETITION.

Even if the Commission has jurisdiction to issue the requested stay of the Iowa Board's Order, the Petition presents no basis on which a stay could be issued. The Iowa Board's Order was comfortably within the limits of the Board's jurisdiction, and, Great Lakes' inflammatory rhetoric to the contrary notwithstanding, Great Lakes has shown no more basis for a stay than it has demonstrated a basis for preemption.

Analysis of the preemption issues is made very difficult because the Great Lakes Preemption Petition was filed prematurely, and requested preemption of an Order that had not been issued. Comments in support of and in opposition to the Preemption Petition were filed on

[5] *See* 47 C.F.R. § 543(b)(5)(c).

the same day the Order was released, and hence could not address what the Order actually said. It turns out that the Order attacked in the Petition was never issued, as the actual Order of the Iowa Board differed dramatically from the one imagined by Great Lakes. The actual Iowa Board Order makes it quite clear that the Iowa Board was acutely conscious of both its own statutory obligation to regulate Iowa telecommunications services in accordance with Iowa law and the plenary jurisdiction of the Commission in the regulation of interstate telecommunications. (Great Lakes makes an effort to address the Order in the Motion, and various parties addressed the Order in reply comments on the Preemption Petition filed earlier this week.)

Thus, the hypothetical order attacked in the Preemption Petition differs dramatically from the Order that is the subject of the Stay Motion (and the Order addressed in comments on the Preemption Petition differs from the one addressed in Reply Comments). Asking for a stay of a state order pending a decision on a preemption petition that cannot be granted is simply not a viable position, and the instant stay motion can be quickly disposed of through dismissal of the Preemption Petition subject to refiling. In any event, as the Order itself, and the arguments advanced in the Motion, demonstrate, preemption here is not even a close call -- the Iowa Board acted completely within the scope of its jurisdiction. Even if the Commission had stay authority over the Iowa Board, the Great Lakes claims on the merits remain simply frivolous.[6]

Great Lakes proclaims that preemption of the Iowa Order is appropriate because "[t]he Final Order represents an egregious encroachment on the jurisdiction of the Commission to

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[6] In order to justify a stay pending resolution of a dispute, the moving party must demonstrate: 1) Likelihood of success on the merits; 2) Irreparable harm to the filing party; 3) Lack of harm to other parties; and 4) Advancement of or protection of the public interest. *See Virginia Petroleum Jobbers Asn. v. FPC*, 259 F.2d 921, 925 (D.C. Cir. 1958). This opposition will focus on the first and fourth criteria. We do not agree that Great Lakes has met any of the criteria for a stay.

regulate interstate communications."[7] Great Lakes finds four sources of unlawful intrusion by the Iowa Board into the federal jurisdiction:[8]

- "First, the Board specifically intended to extend its authority to regulate the provision of interstate services."
- "Second, the Final Order conflicts with *Farmers and Merchants* and other applicable Commission precedent by interpreting the NECA interstate tariff inconsistently with these cases."
- "Third, the Board's directive to NANPA to begin reclamation of all telephone numbers assigned to Great Lakes vastly exceeds its delegated authority."
- "Finally, the Final Order creates an impossibility scenario, in which compliance with both federal regulations governing terminating access and the directives in the IUB Final Order cannot be accomplished directly, and thwarts a clearly expressed Congressional policy of fostering competition. . ."

Each of these assertions is addressed separately below.

A. The Iowa Order Does Not "regulate the provision of interstate services."

Great Lakes contends that the Iowa Board "did not limit its findings to only intrastate issues raised in the complaint."[9] Given the multiple times that the Iowa Board expressly disavowed any intent or authority to regulate interstate telecommunications services,[10] this seems to be a strange allegation. Great Lakes backs up the charge by pointing to places in the Iowa Order wherein interstate traffic pumping is described, and where the interstate aspects of traffic pumping are taken note of, but nothing where the Board sought to regulate interstate services.[11]

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[7] Motion at 8.

[8] These four quotations are from pages 8-9 of the Motion. (Emphasis in original, footnote omitted).

[9] *Id.* at 9 (underline in original).

[10] The Iowa Order was submitted on the record in this proceeding via an *ex parte* presentation filed Sept. 21, 2009. *See* Letter from Robert B. Mckenna to Marlene Dortch, Sept. 21, 2009. The Order repeatedly emphasizes that it deals only with intrastate traffic pumping. *See* Final Order at 12-15, 17-18, 24, 35-6, 37-38, 42-43, 49, 53-54, 57 (and n. 22), 61, 62-63, 67-69, 77-78.

[11] Motion at 9-12.

Great Lakes' point is well off the mark. The Iowa Board is prohibited by statute from regulating interstate telecommunications, not from discussing interstate issues that impact on its own sphere of authority.[12] Even a cursory review of the Order demonstrates that Great Lakes' claim that the Iowa Board sought to directly regulate interstate telecommunications services is simply false.

When the Board investigates alleged violations of state law, its authority to hear evidence of conduct occurring outside the four corners of Iowa is well recognized; especially when the case concerns allegations of fraud, such as exists in this case.[13] In this regard, the Board made a number of factual determinations that touched on interstate matters but were clearly directly related to intrastate services. The Board found, for example, that some of the LEC Respondents had opted out of the NECA pool so they could charge and retain higher access rates. Superior opted out of the NECA pool and began to charge 13.6 cents for interstate access, a matter clearly relevant to the Board's investigation. Many of the LECs -- including Superior -- never switched, transported or terminated the calls within their state-certified geographic areas. Instead, these LECs had the calls delivered directly to another LEC who had significantly lower access rates. The LECs concealed the fact that another LEC handled the call. The manner in which the intrastate calls were delivered violated Iowa law, the LECs' certifications and the LECs' local exchange tariffs, again a matter well within the jurisdiction of the Iowa Board. The Iowa statute states that the LECs' certificates of authority "shall define the service territory," and "the

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[12] Great Lakes' chief argument here seems to be that, because traffic pumping by ILECs is heavily dependent on manipulation of the NECA Pool, regulation of intrastate traffic pumping is tantamount to regulating the NECA Pool itself. This is a *non-sequitur*. The fact that the interstate aspects of traffic pumping may inform Iowa's exercise of its own jurisdiction with respect to intrastate traffic pumping is utterly irrelevant.

[13] *See, e.g.,* Statement of former Chairman Powell, *In re Vonage Holdings Corp.,* Memorandum Opinion and Order, 19 FCC Rcd 22404 (2004), *aff'd, Vonage Holdings Corp. v. Minn. Pub. Utils. Comm'n*, 394 F.3d 568 (8th Cir. 2004); *OCMC, Inc. v. Norris,* 428 F. Supp. 2d 930, 938-939 (S.D. Iowa 2006).

[LEC's] certificate and tariffs approved by the board are the only authority . . . to furnish landline telephone service."[14] The potential to obtain huge dollars from opting out of the NECA tariff created the motive for these Iowa LECs to violate their state certification and tariffing requirements, again directly relevant to the proper exercise of the Board's jurisdiction.[15] Courts and commissions routinely allow the finders of fact to hear evidence that concerns motive, intent and planning.[16] The thought that the Board is precluded from hearing facts about the LECs opting out of NECA and the reasons therefore, is not consistent with any legal or jurisdictional theory. These facts are foundational, and bear directly on issues within the Board's express jurisdiction; namely, whether the LEC Respondents violated their state certificates and local exchange tariffs.

Great Lakes mischaracterizes parts of the Order in an effort to make it appear the Iowa Board has overreached. For example, they claim the Board found the FSPs "are not 'end users' under the terms of the NECA Interstate Tariff No. 5 and the LEC's local exchange service tariffs."[17] In reality, the Board found the "FCSCs [Free Calling Service Companies] did not subscribe to the Respondents' ***intrastate switched access or local exchange tariffs***."[18] The reason the Board cites to language from the NECA tariff is because the Iowa LECs -- including Great Lakes and Superior -- opt into the ITA intrastate access tariff, which specifically

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[14] Iowa Code § 476.29(4) & (6); *see also* Iowa Code § 476.101 (CLECs must obtain certificates, etc.); § 476.3 (Board can hear complaints of tariff violations and unjust or unreasonable practices); § 476.29(9) (Board can review LECs' abuse of their certificates).

[15] *See* Final Order at 43-49.

[16] *See, e.g., Midwest Home Distributor, Inc. v. Domco Industries Ltd.*, 585 N.W.2d 735, 744-745 (Iowa 1998) (evidence of motive and intent relevant under Iowa and federal rules).

[17] Motion at 11.

[18] Final Order at 77 (emphasis added).

incorporates by reference virtually all of the language from NECA No. 5. The Board's Order makes this point explicitly:

> Most of the Respondents concur in the language of the ITA Tariff for switched access service for intrastate traffic, which incorporates many terms from the interstate access tariff filed with the FCC. (QCC Complaint, p. 12). In fact, all of the Respondents' access tariffs have adopted the terms, conditions, and definitions in the NECA interstate access tariff with respect to their intrastate switched access service.[5] Therefore, the Board will review the language used for interstate purposes in conjunction with the Respondents' intrastate tariffs and will consequently make reference to the NECA tariff. The Board's analysis, however, is limited to the intrastate application of that language.
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> Note 5: See Exhibit 3, ITA Tariff No. 1, Section 1.1 ("The regulations, rates and charges applicable to the provision of the Carrier Common Line, Switched Access and Special Access Services, and other miscellaneous services, hereinafter referred to collectively as service(s), provided by the Local Exchange Utility, herein after referred to as the Company, to Intrastate Customers, hereinafter referred to as IC's, are the same as those filed in the Exchange Carrier Association Tariff F.C.C. No. 5 with the exceptions listed herein"). (Emphasis added.) No relevant exceptions are listed.[19]

As note 5 indicates, the ITA intrastate access tariff does not repeat the actual terms of the NECA tariff, but rather incorporates them by reference. It is therefore impossible for the Board to reference solely the ITA tariff in its Order. When referencing language in the NECA tariff, the Board was thereby interpreting the intrastate access tariff. The Board plainly has authority to interpret and apply state tariffs.[20] And, the Commission clearly recognizes that state commissions have jurisdiction over intrastate access tariffs:

> LDDS does not challenge the *credit* it received in connection with the recalculation of its interstate access bill. Rather, it objects to the retroactive *increase in liability* for intrastate access. As noted above, this is a matter governed by United's Florida tariff and one over which the Florida PSC, not this Commission, has jurisdiction. Although this Commission unquestionably would have the authority to decide issues arising under United's federal tariff, we conclude that LDDS's complaint, fairly read, presents no such issues. The Act

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[19] *Id.* at 17-18 (underline in original).

[20] *See* 47 U.S.C. § 152(b); *Louisiana Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) (Section 152 is Congressional denial of authority over intrastate matters); *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 381 n.8 (1999) (except as expressly provided otherwise by the 1996 amendments, 47 U.S.C. Section 152 continues to limit FCC jurisdiction).

> creates clear jurisdictional lines which we are bound to observe. Given these restrictions on our authority, the relationship between percentage of interstate and intrastate use provides an insufficient basis for us to exercise jurisdiction over the retroactive adjustment of LDDS's intrastate access charge liability.[21]

The fact that the intrastate tariff's language is identical to the interstate tariff is irrelevant.[22] Great Lakes' argument essentially would have the Commission find that only the Commission can interpret state tariffs which incorporate the NECA or other federal tariffs. This would largely eviscerate state commissions' authority over intrastate access tariffs, since virtually all LECs adopt identical terms for their interstate and intrastate tariffs. Had the Iowa Board sought to impose its interpretation of the NECA tariff on the FCC, that would be a different matter (although conceptually no different than the request by Great Lakes that the FCC assume control over interpretation of intrastate tariffs that mimic the language of the NECA tariff).

Likewise, Great Lakes claims the Board found that "international VoIP traffic does not terminate at an end user's premises."[23] In reality, the Board found that "intrastate toll traffic did not terminate at the end user's premises."[24] The intrastate access tariff defines "premises" as "a building or buildings on contiguous property...."[25] To support this finding, the Board interpreted the intrastate tariff and found the "term 'end user's premises,' while not specifically defined in the tariff, generally denotes a building or buildings that is owned, leased, or otherwise controlled

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[21] *LDDS Commc'ns, Inc. v. United Tel. of Florida*, Memorandum Opinion and Order, 15 FCC Rcd 4950, 4954-55 ¶ 13 (2000) (in relevant part; emphasis original; footnotes omitted).

[22] *See, e.g., In the Matter of Thrifty Call, Inc., Petition for Declaratory Ruling Concerning, BellSouth Telecommunications, Inc., Tariff F.C.C. No. 1*, Declaratory Ruling, 19 FCC Rcd 22240, 22244 ¶ 11 (2004) (no question that state commission had authority to interpret intrastate access tariff, regardless that language in question was identical to that of the interstate tariff).

[23] Motion at 11.

[24] Final Order at 78; *see, e.g., Thrifty Call,* 19 FCC Rcd at 22244 ¶ 11.

[25] Final Order at 36.

by the end user."[26] The facts showed the LEC Respondents delivered the calls to their own central offices at a location most of the FSPs had never seen, let alone owned, leased or controlled. The actual decision of the Board was that traffic delivered to another country was not intrastate toll traffic -- certainly well within the Board's authority.

Great Lakes goes so far as to argue that the Board is without jurisdiction to find that the FSPs are not end users of the LECs' local exchange tariffs.[27] But the Board has unquestioned jurisdictional authority to assess the facts and determine whether a purported customer has subscribed to local service from a LEC certificated in Iowa -- this is the very core of a state commission's regulatory authority. Many LEC Respondents argued the FSPs were end users under their access tariffs because they claimed to subscribe to the LECs' local exchange tariffs. Thus the decision of the Board that the FSPs were not local exchange customers was not only within the Board's jurisdiction but was in direct response to arguments made by some of the Respondents.

The evidence on which the Board relied in evaluating the allegation by the Respondents that the FSPs were their "end user customers" under their intrastate and local exchange tariffs was overwhelming. In fact, as the Board found, several Respondents (Reasnor, Farmers & Merchants, Dixon and Interstate 35)[28] "manufactured" backdated invoices and contracts "to make the transactions with [FSPs] look like something that was not contemplated by the Respondents or the [FSPs] when they first entered into these arrangements."[29] Specifically, the LECs in question backdated evidence to make it appear that mandatory fees, taxes and surcharges were

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[26] *Id.* at 38.

[27] Motion at 13.

[28] Final Order at 26.

[29] *Id.* at 29-30.

billed and paid. However, none of the LEC Respondents (including Great Lakes), ever issued invoices to any FSPs, expected payment from FSPs, or paid taxes or fees relating to services provided to FSPs.

Based on the voluminous record, the Iowa Board therefore found that the FSPs did not subscribe to local exchange service, nor intend to subscribe for such a service.[30] As part of its regulatory authority over the LECs' conduct (*e.g.,* Iowa Code § 476.3), the Board has plenary authority to assess not only whether some of its certificated LECs subscribed to local exchange service, but also whether they manufactured evidence to trick the Board, long distance carriers and others into believing that they had provided FSPs with local exchange service.

Great Lakes also suggests that the Board ordered a refund of interstate and intrastate access charges alike.[31] The Board explicitly stated that it was ordering a refund only of improperly assessed intrastate access charges: "The Board directs the Respondents named in this complaint to refund the terminating switched access fees charges ***associated with the delivery of intrastate interexchange calls*** to numbers or destinations assigned to or associated with FCSCs and that were paid by QCC, Sprint, or AT&T."[32] The Board clearly has authority to order the refunds of intrastate access charges.[33]

Great Lakes' claims that the Board attempted to regulate interstate services are simply false.

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[30] *Id.* at 24-25.

[31] Motion at 12.

[32] Final Order at 79, ordering clause 2 (emphasis added).

[33] Iowa Code §§ 476.3, 476.11; 199 IAC § 22.14; *Equal Access Corp. v. IUB*, 510 N.W.2d 147, 150 (Iowa 1993); *In re Iowa Telecommc'ns Ass'n,* 2007 WL 4135212 (IUB) (rel. Nov. 15, 2007) (authority over intrastate access rates of small LECs).

B. The Iowa Order Does Not "conflict[] with federal law."

Great Lakes' second assertion is that the Iowa Board acted contrary to federal law in determining that the FSP partners of the respondent LECs were not end users under the intrastate tariffs of the eight respondents in the Iowa case (including Farmers and Merchants Mutual Cooperative Telephone Company). The basis of this claim is the Commission's decision in *Qwest v. Farmers and Merchants Mutual Telephone Company*,[34] in which the Commission found that traffic to FSPs was covered by the interstate tariffs of Farmers and Merchants Mutual Telephone Company. Great Lakes contends that this decision requires that the Iowa Board reach the same conclusion concerning the intrastate tariffs of Farmers and Merchants as well as the other seven respondents in the Iowa case.[35] This is, of course, a phony issue because there is absolutely no requirement that the Iowa Board and the Commission interpret identical language in different tariffs in the same manner. A Commission decision interpreting an interstate tariff is by no means binding on a state regulator interpreting an intrastate tariff -- even if the language in the two tariffs is identical.

Moreover, the Commission has already considered and rejected the very argument that *Farmers and Merchants* is binding precedent for anything, far less binding law governing the Iowa Utilities Board. The Commission has made it very clear that the *Farmers and Merchants* decision is neither final nor binding precedent.

Farmers and Merchants is a formal complaint proceeding, an adjudication examining the specific facts of the traffic pumping operations of a particular ILEC, Farmers and Merchants Mutual Telephone Company, and the particular interstate tariffed rates that Farmers and

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[34] *In the Matter of Qwest Communications Corporation v. Farmers and Merchants Mutual Telephone Company*, Memorandum Opinion and Order, 22 FCC Rcd 17973 (2007), *modified on recon.*, 23 FCC Rcd 1615 (2008).

[35] Motion at 12-14.

Merchants charged in its traffic pumping operation. The Commission had found, based on the facts of record, that Farmers and Merchants had violated the Federal Communications Act by charging unlawful and unreasonable rates but that Farmers and Merchants' conference calling partners were end-user customers under the facts presented and the language of the Farmers and Merchants' interstate tariff. There was never any intention by the Commission to take any aspects of the *Farmers and Merchants Decision* beyond the scope of the facts examined, even in future proceedings involving other parties before the Commission itself.

What is more, the Commission granted Qwest's petition for reconsideration in *Farmers and Merchants* in order to examine the precise ruling that Great Lakes seeks to impose on the State of Iowa. Great Lakes seriously misstates the nature of the reconsideration proceeding in *Farmers and Merchants.* The Qwest petition for reconsideration in *Farmers and Merchants* was granted by the Commission in order to consider the impact of back-dated documents on the status of FSPs as subscribers under Farmers and Merchants' interstate tariff. Qwest claimed in its reconsideration petition that Farmers and Merchants had deliberately withheld certain critical evidence, and created and backdated certain relevant documents, in order to create the false impression that its FSP partners were end-user customers under its tariff. It is by no means the law even at the federal level that FSPs are subscribers and/or end users under any LEC's interstate tariff, including that of Farmers and Merchants itself.

The Commission itself has made this very clear. In *In the Matter of Request for Review by InterCall, Inc.*, the Commission addressed a similar argument in the context of evaluating the liability of audio bridge providers to make universal service contributions, and stated as follows:

> Similarly, InterCall's attempts to cast the decision in the *Qwest v. Farmers Order* as evidence that the Commission has determined that conference calling companies are end users is misplaced. As in the *Call Blocking Decision*, the Commission was assuming certain facts in the case as the parties presented them.

> Specifically, the Commission's statement that conference calling companies are end users was premised on Farmer's assertion that this was how they were defined in Farmer's tariff. Moreover, as Verizon notes, the holding in the *Qwest v. Farmers Order* is subject to reconsideration on the factual issue of whether the conference calling companies were end users under Farmer's tariffs. We, therefore, conclude that the prior precedent cited by InterCall does not support a finding that InterCall is an end user for purposes of direct USF contribution obligations. Rather, InterCall and other similarly-situated audio bridging service providers are providers of telecommunications, and, as such, have an obligation to directly contribute to USF.[36]

Great Lakes does not address this decision of the Commission in any of its filings.

In any event, even in the case of Farmers and Merchants itself (the party to the Commission proceeding), the Iowa Board is under no compulsion to interpret LEC intrastate and local exchange tariffs in the same manner as the Commission interprets interstate tariffs, even if the language of the two tariffs is identical. For the other Respondents before the Iowa Board, the argument that Farmers and Merchants is "binding" precedent is simply far fetched.

C. The Iowa Board's Directive To The North American Numbering Plan Administrator And The Pooling Administrator To Reclaim The Numbers Assigned To Great Lakes Does Not "exceed[] its authority."

Great Lakes (the only respondent before the Board to whom this finding applies) contends that the directive of the Iowa Board to the North American Numbering Plan Administrator and the Pooling Administrator to "reclaim" the telephone numbers assigned to Great Lakes exceeded the authority of the Board.[37] Great Lakes misses the point that the Commission has delegated to the Iowa Board the precise authority which Great Lakes claims the Board does not have. Section 52.15(i)(5)[38] of the Commission's rules states:

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[36] *In the Matter of Request for Review by InterCall, Inc. of Decision of Universal Service Administrator*, Order, 23 FCC Rcd 10731, 10737 ¶ 21 (2008) (footnotes omitted).

[37] Motion at 14-17.

[38] 47 C.F.R. § 52.15(i)(5) (emphasis added).

> The NANPA and the Pooling Administrator shall abide by the state commission's determination to reclaim numbering resources if the state commission is satisfied that the service provider has not activated and commenced assignment to end users of their numbering resources within six months of receipt.

That is precisely the finding made by the Iowa Board -- that because Great Lakes serves only FSPs and no end users under its intrastate tariff, it never activated and commenced assignment of numbering resources to end users. As the Iowa Order is clearly within the authority delegated to it under the Commission's rules, preemption is clearly not warranted.[39]

D. No Other Grounds Exist For Preemption.

Under the guise of what it calls an "impossibility scenario,"[40] Great Lakes puts forth a grab-bag of arguments purporting to shore up its preemption argument. These arguments are transparently without merit.

- Great Lakes argues that the Commission has "occupied the field" of traffic pumping regulation.[41] The basis for this argument is that the Commission has a pending rulemaking outstanding contemplating what to do about the traffic pumping problem from an interstate perspective. A pending but unadopted rulemaking cannot, by definition, "occupy the field" of state regulation of intrastate telecommunications, even if one of the issues under consideration were to be preemption of intrastate regulation of intrastate telecommunications services.

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[39] While the Motion and the Preemption Petition all speak of action directed at the Iowa Board, the first paragraph of the Motion asks that the Commission issue an order to the NANPA and Pool Administrators not to follow the directive of the Iowa Board to reclaim the Great Lakes numbers. This separate request for relief is not properly presented in either the Motion or the Preemption Petition.

[40] Motion at 8-9.

[41] *Id.* at 17.

- Great Lakes claims that the Board lacks jurisdiction over intrastate traffic pumping because its "Order flouts the Commission's prohibition on self-help refusals to pay access charges."[42] While the relevance of the Iowa Board's refusal to order Qwest and others to pay for intrastate traffic pumped to FSPs to an analysis of the Board's jurisdiction is hard to grasp (that is, it is totally irrelevant), Great Lakes should also take note of the fact that an almost identical determination was made by the Commission in the *Farmers and Merchants* case.[43] The Commission has repeatedly disclaimed the authority to act as a collection agency for carriers. Iowa's policies on enforcement of its own laws regarding the payment of carrier charges present no basis for federal preemption.
- Great Lakes claims that the Iowa Order creates an "impossibility scenario" because rulings as to what constitutes a premises, an end user and termination in the intrastate tariffs "apply to all traffic, and thus necessarily impact on interstate communications." Great Lakes posits that a "'physical impossible' problem" is created such as identified by the Supreme Court in *Louisiana Public Service Commissions v. FCC* and that the Iowa Board is thereby precluded from regulating intrastate telecommunications.[44] But *Louisiana Public Service Commission* stands for exactly the opposite proposition -- namely, that the fact that it may be impossible to sever the intrastate and interstate aspects of a particular service, facility or regulation is not alone a sufficient basis for the Commission to preempt state action. In the *Louisiana Public Service Commission*

[42] *Id.* at 17-18.

[43] *Qwest v. Farmers*, 22 FCC Rcd at 17984-85.

[44] Motion at 8-9.

case the Commission had established uniform depreciation methodologies for telecommunications plant, and determined that it would interfere with federal policy regarding competition for state regulators to be able to utilize a different methodology when depreciating the same plant for intrastate ratemaking purposes. The Supreme Court reversed the Commission's action, finding that the statutory barrier against federal preemption of state regulation of intrastate telecommunications did not permit Commission preemption at all -- far less mandate it.[45] The proper standard for application of the "impossibility" test for preemption has been summarized by the D.C. Circuit Court of Appeals as follows:

> Recognizing this tension and overlap, the Supreme Court in *Louisiana PSC* said the FCC may preempt state regulation of an intrastate matter only when the matter has interstate aspects . . . of the asserted FCC regulation.' . . . FCC preemption of state regulation is thus permissible when (1) the matter to be regulated has both interstate and intrastate aspects, . . .(2) FCC preemption is necessary to protect a valid federal regulatory objective, . . . and (3) state regulation would 'negate[] the exercise by the FCC of its own lawful authority' because regulation of the interstate aspects of the matter cannot be 'unbundled' from regulation of the intrastate aspects.[46]

The fact that the State of Iowa possesses the independent authority to examine terms in an intrastate tariff under its own jurisdiction can hardly be surprising given the language of the Act. Great Lakes has made no showing that any of the criteria for preemption under the "impossibility" test have been met. Of particular note, Great Lakes has not identified any valid federal regulatory objective that is thwarted by the Iowa Board's Order. There is, for example, no federal policy in

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[45] *See La. Public Serv. Comm v. FCC,* 476 U.S. 355.

[46] *Public Service Commission of Maryland v. FCC*, 909 F.2d 1510, 1515 (D.C. Cir. 1990).

favor of traffic pumping, and Section 253(b) of the Act expressly reserves for states the right to protect the public and consumer welfare.

- Lastly, Great Lakes contends that the Order "regulat[es] traffic that uses Internet protocol to route calls to overseas numbers."[47] The Board determined that calls from within the State of Iowa to international numbers did not terminate in the State of Iowa for the purposes of assessment of intrastate access charges. In other words, the Board determined that the overseas calls from within the State of Iowa to a foreign location were not local or intrastate in nature for intrastate access charge purposes. Again, Iowa clearly has the authority to make such a determination.

Great Lakes has presented no information that indicates that its pending Preemption Petition, especially if analyzed in the light of the actual Iowa Order (rather than a mischaracterization of that Order) has any chance of success whatsoever, far less a level of credibility that would warrant a stay of the Iowa Order by this Commission pending resolution of the Preemption Petition itself.

III. GRANT OF THE STAY MOTION WOULD BE CONTRARY TO THE PUBLIC INTEREST.

Another requirement for grant of a stay pending further disposition is that the grant of the stay be in the public interest.[48] Great Lakes' effort to claim that the public interest would be served by federal preemption of the Iowa Board consists largely of rhetoric, tossing in inflammatory phases such as "defies the Commission's precedent,"[49] "intentionally regulating

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[47] Motion at 18-19.

[48] *See* note 6, *supra.*

[49] Motion at 24.

the provision of interstate services,"[50] and "egregious encroachment on the jurisdiction of the Commission."[51] In point of fact, fundamental principles of comity require that the Commission utilize its preemptive jurisdiction sparingly with due respect for the fact that state regulators are themselves part of the apparatus of sovereign states.[52] A preemptive stay based upon speculation and legal mischaracterization, coupled with insulting rhetoric directed at state regulators, would be a far cry from the fundamental public interest that is at stake whenever the Commission is called upon to examine whether to preempt state regulation of intrastate telecommunications. The Stay should be denied on public interest grounds alone.

IV. CONCLUSION.

The Commission lacks authority to stay the Iowa Board's Order. In any event, the requested Stay should be denied. In order to obtain a stay of a valid order of a state regulatory agency, a petitioner must make a powerful case that it will ultimately succeed on the merits and that grant of a stay is in the public interest. Great Lakes has failed utterly in both of these departments. Instead, Great Lakes has firmly demonstrated that it will ultimately fail on the merits of its Preemption Petition and that the requested Stay would be directly contrary to the public interest. The Stay Motion filed by Great Lakes should be promptly denied. The

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[50] *Id.*

[51] *Id.* at 8.

[52] *See In the Matter of Petition of Autotel Pursuant to Section 252(e)(5) of the Communications Act for Preemption of the Jurisdiction of the Public Utilities Commission of Nevada Regarding Arbitration of an Interconnection Agreement with SBC Nevada*, Memorandum Opinion and Order, 19 FCC Rcd 20920, 20924-25 ¶ 11, n.37 (2004); *In the Matter of Global NAPS, Inc. Petition for Preemption of Jurisdiction of the Massachusetts Department of Telecommunications and Energy Pursuant to Section 252(e)(5) of the Telecommunications Act of 1996*, Memorandum Opinion and Order, 15 FCC Rcd 4943, 4946 ¶ 8 (2000); *In the Matter of Detariffing the Installation and Maintenance of Inside Wiring*, Third Report and Order, 7 FCC Rcd 1334, 1336 ¶ 17 (1992).

underlying preemption request should likewise be promptly dismissed or denied. It is time to put to rest the waste of resources generated by this proceeding.

Respectfully submitted,

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Its Attorneys

October 8, 2009

CERTIFICATE OF SERVICE

I, Richard Grozier, do hereby certify that I have caused the foregoing **OPPOSITION OF QWEST COMMUNICATIONS COMPANY, LLC. TO EMERGENCY MOTION FOR STAY** to be 1) filed via ECFS with the Office of the Secretary of the FCC; 2) served via email on the FCC's duplicating contractor Best Copy and Printing, Inc. at fcc@bcpiweb.com; and 3) served via First Class United States Mail, postage prepaid, on the party listed below.

/s/ Richard Grozier

October 8, 2009

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